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**Revisiting the critique against territorialism in the Law of the Sea:** Brazilian state practice in light of the concepts of creeping jurisdiction and *spoliative* jurisdiction

**Revisitando a crítica ao territorialismo no Direito do Mar:** a prática do estado brasileiro à luz dos conceitos da jurisdição rastejante e jurisdição espoliativa

Victor Alencar Mayer Feitosa Ventura

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EXCLUSIONS AND ITS CRITICS:  
SOUTHERN NARRATIVES OF INTERNATIONAL LAW

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# Revisiting the critique against territorialism in the Law of the Sea: Brazilian state practice in light of the concepts of creeping jurisdiction and *spoliative* jurisdiction\*

## Revisitando a crítica ao territorialismo no Direito do Mar: a prática do estado brasileiro à luz dos conceitos da jurisdição rastejante e jurisdição espoliativa

Victor Alencar Mayer Feitosa Ventura\*\*

### ABSTRACT

The United Nations Convention on the Law of the Sea (UNCLOS) consolidated considerable powers for coastal states. Such codification did not come on a plate, but derived from continuous opposition to historical hegemonisms in the seas. This paper offers an alternative account of the expansion of coastal state jurisdiction by differing from the traditional narrative which emphasizes the subversive and disruptive nature of coastal states' jurisdictional assertions prior and during the III United Nations Conference on the Law of the Sea. Traditional scholarship often alarmed against “territorialism” and the “creeping jurisdiction”, while shielding the principle of freedom of the seas. In this context, Brazil attracted plenty of criticism for its prominent role in thrusting coastal state's authority seaward. This paper adopts a historiographic perspective on key developments of international law of the sea and analyzes the Brazilian practice on the issue between 1945 and 1982. At the end, two main conclusions are reached: Brazil has been more of a catalyst for change than a provocateur of the *ordre publique océanique*; secondly, were it not for creeping jurisdiction before the adoption of UNCLOS, the international community would still collude with a regime of “*spoliative* jurisdiction”, a practice as old as the law of the sea's colonial origins. The practical implications of this argument are that some behaviors often dismissed as “creeping jurisdiction” maybe tolerated in light of the context in which they occur and the values at stake.

**Keywords:** Law of the Sea. Territorialism. Creeping Jurisdiction. Coastal State Jurisdiction. Brazilian State Practice.

### RESUMO

A Convenção das Nações Unidas sobre o Direito do Mar (UNCLOS, em inglês) confirmou poderes consideráveis para os Estados costeiros. Tal codificação não foi regalada, mas resultou da oposição contínua a hegemonismos históricos no mar. Este artigo oferece um relato alternativo da

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expansão da jurisdição do Estado costeiro, diferindo da narrativa tradicional que enfatiza a natureza subversiva e disruptiva das pretensões jurisdicionais desses Estados, antes e durante a III Conferência das Nações Unidas sobre o Direito do Mar. A doutrina tradicional alarmava reiteradamente contra o “territorialismo” e a “jurisdição rastejante”, ao tempo em que blindava o princípio da liberdade dos mares. Nesse contexto, o Brasil atraiu muitas críticas por seu papel proeminente na expansão da autoridade do Estado costeiro sobre o mar. Este artigo adota perspectiva historiográfica sobre os principais desdobramentos do Direito Internacional do Mar e analisa a prática brasileira sobre o tema entre 1945 e 1982. Ao final, duas conclusões centrais são alcançadas: o Brasil revelou-se mais um catalisador de mudanças do que um desestabilizador da ordem pública oceânica; em segundo lugar, não fosse pela jurisdição rastejante prévia à adoção da UNCLOS, a comunidade internacional ainda conviveria com um regime de “jurisdição espoliativa”, prática tão antiga quanto as próprias origens coloniais do Direito do Mar. Decorre desse argumento que algumas condutas estatais, muitas vezes rotuladas como “jurisdição rastejante”, possam ser toleradas à luz do contexto em que ocorrem e dos valores em jogo.

**Palavras-chave:** Direito do Mar. Territorialismo. Jurisdição Rastejante. Jurisdição do Estado Costeiro. Prática Estatal Brasileira.

## 1. INTRODUCTION

Of international legal regimes, the law of the sea is one in which legal and political insurgency played a most proactive role in forging the current normative order of the oceans. In particular, the decades preceding the adoption of the UNCLOS were of intense movement and witnessed a spectacular *turn* from the absolute prevalence of the principle of freedom of navigation (*mare liberum*) to the ascension of the principle of territorial sovereignty of coastal states (*mare restrictum*, different from the *mare clausum* theory defended by Seldon). Such development did not happen overnight and above all, it did not rain down. To the contrary, it was the result of constant objection by coastal states (some developed, most developing) to the traditional dual division of the ocean into territorial sea and high seas. As one can imagine, opposition did not always take place within the boundaries of existing norms, neither of treaty

nor customary nature. Precisely the breaching of norms preceding the adoption of the UNCLOS was criticized in specialized law of the sea literature.

In this context, this paper identified the need for offering a counterweight to the traditional literature which defied and still defies limitations to the principle of freedom of the seas, even in cases where the prevalence of this principle could lead, and was in fact leading, to unjust and predatory relations in the international arena. It was the case of the years before the III United Nations Conference on the Law of the Sea (UNCLOS). It is past time developing states embrace a narrative that praises the resistance staged by fellow states, including Brazil, against the traditional model of colonial spoliation of marine resources in coastal states' adjacent waters.

Methodologically, it adopts a historiographic perspective on key developments within the international law of the sea, an approach inspired by but not entirely based on John Pocock's contextualism, the “intellectual historian”.<sup>1</sup> The historical approach followed here focuses on the heart of the matter and on context, rather than on texts.<sup>2</sup> As such, it is a provocation, a sketch in understanding how the phrases “creeping jurisdiction” and “territorialism” have been understood and used by international lawyers and with what consequences. Should it trigger some discomfort with the wide use of such expression to refer to pre-UNCLOS developments, it will have fulfilled its goal.

To that intent, the paper will present specialized literature that excoriated “territorialism” and “creeping jurisdiction” in the law of the sea. To that parcel of literature, Brazil was viewed as “leader of territorialists”<sup>3</sup> and, as such, an actor causing systemic instability in the oceanic rule of law. Thus, a core part of this essay is dedicated to the analysis of Brazilian state practice before

1 POCKOCK, John Greville Agard. Languages and their implications: the transformation of the study of political thought. In: POCKOCK, John Greville Agard. **Politics, language and time: essays on political thought and history**. Chicago: University of Chicago Press, 3-41, 1989, pp. 3-10.

2 POHL, Reynaldo Galindo. The Exclusive Economic Zone in the Light of the Third United Nations Conference on the Law of the Sea. In: VICUÑA, Francisco Orrego (Ed.). **The Exclusive Economic Zone: A Latin American Perspective**. Foreign Relations of the Third World, n. 1, Boulder: Westview Press, 1984, p. 32.

3 KWIATKOWSKA, Barbara. Creeping Jurisdiction beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice. **Ocean Development & International Law** 22, n. 2, 153-87, 1991, p. 163.

and during the III UNCfLOS. It is not attempted here to forward a blind defense of every stance Brazil has ever taken ocean-wise. This is not an exercise of thoughtless patriotism, since there are no angels in the international stage, but rational and self-interested players. To the contrary, this is an assessment of the positions taken by that country during the III UNCfLOS, which may have been excessive, and the contributions given towards a fairer and more stable international *ordre public* for the oceans.

This paper represents an effort to escape legal dogmatism and fetishism, favoring instead an approach that brings together international law, international relations theory and historical aspects of both. An approach that takes into account those power struggles behind both internationally agreed norms and violations of established customs. The international law of the sea is an amazingly fertile field in this sense, as it mirrors power struggles and objections to established norms, having produced the most extraordinary international instrument of the twentieth century, the UNCLOS.<sup>4</sup>

## 2. FROM THE ALMOST ABSOLUTE FREEDOM OF THE SEAS PARADIGM TO THE RISE OF COASTAL STATES

The law of the sea, as a special regime of international law, consists of and has been essentially shaped by the antagonism between two key legal principles: freedom of the seas and territorial sovereignty. Historically, the field stems from a continuous clash amid conflicting interests: those of maritime powers, nations with primordial interest in shipping and sailing the world's oceans, and those of coastal states interested in securing resources within their adjacent waters.<sup>5</sup> Such an ac-

count lays emphasis on the distinction between “maritime” and “coastal” states, a contrast based on the state's ability and predicaments to sail the seas.<sup>6</sup>

On the one side, maritime or naval powers such as Portugal, Spain, The Netherlands, France, England, Canada, Russia, the United States, among others, cruising every inch of the oceans with absolute freedom, scooping up living resources from every metric cube, and trading with peoples from all parts of the world.<sup>7</sup> On the other side, coastal states, a heterogeneous category that comprised both developed and developing countries. While developed coastal states set the goal to secure exclusive access to ocean resources, in particular of the subsoil of submarine areas, based on strategical and geopolitical calculations, developing coastal states intended to halt the harvest of their natural resources by merchant fleets of wealthier countries. Those coastal states brought about a sea-change in traditional maritime delimitation schemes, prompted by bold jurisdictional claims. The chronological landmarks for the shaking of law of the sea's structure are, beyond controversy, the 1945 Truman Proclamations.<sup>8</sup>

1981.

6 The category of “coastal states” is not homogeneous. Whereas all (powerful) maritime states are necessarily coastal states, the opposite does not hold true. Throughout history, until current days, such category has been shared by states well-off and a mass of developing and underdeveloped states. Belonging to the former are Western European countries, the US, Canada, Japan and Australia, to name but just a few of the so-called First World countries. In the latter group, Latin American states and former African colonies, Middle-Eastern states, countries from South and South-East Asia, and Small Island Developing States. More on the topic can be found at VENTURA, Victor Alencar Mayer Feitosa. Tackling Illegal, Unregulated and Unreported Fishing: the ITLOS Advisory Opinion on Flag-state Responsibility for IUU Fishing and the Principle of Due Diligence. *Brazilian Journal of International Law* (Revista de Direito Internacional), v. 12, issue 1, 2015, pp. 52-55.

7 Another phrase for maritime powers is “naval powers”. See POHL, Reynaldo Galindo. The Exclusive Economic Zone in the Light of the Third United Nations Conference on the Law of the Sea. In: VICUÑA, Francisco Orrego (Ed.). *The Exclusive Economic Zone: A Latin American Perspective*. Foreign Relations of the Third World, n. 1, Boulder: Westview Press, 1984, p. 36.

8 US Presidential Proclamations No. 2667, *Policy of the United States with Respect to the Natural Resources of the Subsoil of the Seabed and the Continental Shelf*, and No. 2668, *Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas*, done at Washington, 28 September 1945, 10 FR 12303. Even though the Truman Proclamation on the Continental Shelf is probably the most known episode of territorial expansion seaward, it was not the first move to advance claims to maritime areas beyond the territorial sea. Prior developments in this regard include the 1942 Treaty between the UK and Venezuela Relating to the Submarine Areas of the Gulf of Paria, which divided

4 The UNCLOS has 320 articles and was designed to regulate practically all uses of the ocean, to the extent of having been nicknamed the “Constitution of the Oceans”, by Tommy Koh, President of the Third United Nations Conference on the Law of the Sea, on 11 December 1982. It goes without saying that the Convention, no matter how complete at the outset, is a product of its time and has already needed modifications and revisions. It was the case of the 1994 Implementing Agreement on Part XI, relating to the Area, and the 1995 United Nations Fish Stock Agreement, adopted in New York, so as to complement provisions on the conservation of straddling stocks and highly migratory fisheries.

5 MCDORMAN, Ted L. *The marine environment and the Caracas Convention on the Law of the Sea: a study of the third United Nations Conference on the Law of the Sea and other related marine environmental activities*. Halifax: Dalhousie University Press,

The typical account of the events that followed the Truman Proclamations, in line with traditional law of the sea literature, speaks of the breeding of an unexpected problem to the *ordre public océanique*. A problem that began when coastal states, one after another, in particular following the post-decolonization wave of the 1960s and 1970s, unilaterally nationalized marine resources, mainly fisheries, through a series of “enclosures” of adjacent waters offshore. Those national claims were seen as excessive, due to the lack of harmonious international practice on the matter. In this scenario, Latin American countries, amongst which Brazil, became notorious for their “territorial ambitions”.<sup>9</sup>

The stage between 1945 and the kickstart of the III UNCLOS in 1973<sup>10</sup> was, thus, predominantly marked by opposition to the old dual division of the seas – the three-mile “marginal sea” and the high seas.<sup>11</sup> Such hostility was fueled by a new set of qualities attributed to oceans by the end of World War II, which entirely changed their significance for nations. Until the end of the war, the dual division took only two dimensions of the seas into account: water surface and water column. Oceans were essentially vectors for the carriage of goods and transport of persons (surface), as well as sources of food and vectors of communication, via submarine cables (water column).

After 1945, technological breakthroughs added other dimensions to the oceans: subsoil and airspace. At stake were not only living resources, fisheries, but especially non-living resources, such as hydrocarbons and minerals on and underneath the seafloor. Humankind was finally able to explore and exploit natural resources, namely hydrocarbons, in depths unknown to men before. In addition to that, technologically advanced

states were able to capitalize on energy resources from the airspace above water, such as wind and solar energy. In a nutshell, perception of the economic and strategic meaning of this *pluri-dimensionality* of the seas played a most relevant role in precipitating objection not only to the traditional dual division, but also to the preponderance of untouchable freedoms. It became clear to international lawyers that the law of the sea was undergoing profound changes, to such an extent that even during negotiation on a binding treaty for the oceans, statements of a “new international law of the sea” were common in literature.<sup>12</sup>

Upon adoption of the UNCLOS in 1982, prevalence of the principle of freedom of the seas was called in question and the balance leaned towards the principle of sovereignty, as the Convention codified additional powers to coastal states. A most relevant factor during negotiations was the participation of newly independent African and Asian states, which embraced significantly different positions from those of their colonial predecessors. Conjointly with other Third World countries, sympathetic to the political orientation of the so-called “Group of 77”,<sup>13</sup> they played an important role in the III Conference. There, coastal states have fulfilled old demands of exclusive jurisdiction over marine resources in phenomenon that could be named as the *rise of coastal states*.

The problem is that such rise was seen as the product of “creeping jurisdiction”, in which states anarchically and unilaterally asserted powers over larger areas of the oceans. There has been a great deal of doom-sayers against creeping jurisdiction, against the enclosure of the seas, and against territorialist countries. For the purposes of the law of the sea, creeping jurisdiction is usually referred to as the practice by sovereign states of seeking to extend territorial jurisdiction over mariti-

the seabed and the subsoil beyond respective territorial seas at the Gulf, signed at Caracas, 26 February 1942, 205 LNTS 122, and terminated on 23 July 1991. The Treaty was the first one in the world to delimit the seabed.

9 VARGAS, Jorge A. Latin America and its contributions to the Law of the Sea. In: LAURSEN, Finn (Ed.). **Towards a New International Marine Order**. Leiden: Nijhoff, 1982, p. 58.

10 The Conference was convened by virtue of United Nations General Assembly **Resolution 2750 (XXV)**, Reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of a conference on the law of the sea. 17 December 1970.

11 TREVES, Tullio. Coastal States’ rights in the maritime areas under UNCLOS. **Brazilian Journal of International Law** (Revista de Direito Internacional), v. 12, issue 1, 2015, p. 41.

12 The theory of pluridimensionality or multidimensionality of the oceans was originally formulated by Marotta Rangel, with the difference he labeled the newer dimension as “depth”, whereas to our understanding the dimension of depth had already been exploited via the setting of submarine cables since mid-nineteenth century. The appended dimensions were the subsoil of submarine areas and the air column above the sea. See RANGEL, Vicente Marotta. O novo Direito do Mar e a América Latina. **Revista da Faculdade de Direito da Universidade de São Paulo**, 1981, pp. 41-42.

13 The Group of 77 advocated a more radical form of “common heritage of mankind” principle, based on the ideology underpinning the so-called New International Economic Order (NIEO), designed to rebalance economic relations between industrialized countries of the North and poorly developed states of the South. See discussion below.



me spaces<sup>14</sup> beyond what is permitted by international customary or treaty law.<sup>15</sup> In other words, the “extension of municipal jurisdiction seaward along the seabed and from thence to the vertical column above and the souterrain below”<sup>16</sup> or the “gradual extension of State jurisdiction offshore”, part of a steady jurisdictional expansionism towards the high seas.<sup>17</sup> In short, creeping jurisdiction would be the power unilaterally revendicated by the coastal state in violation of existing norms, beyond either the maritime boundaries established therein or the competences exercisable in each zone.

Key elements of the concept are, accordingly, the *unilaterality* of claims, and the *violation* of a valid international legal rule.<sup>18</sup> Those elements accentuate, so traditional accounts within law of the sea literature, the inherent viciousness of jurisdictional assertions and how much they threaten the stability of the international rule of law in oceanic affairs. In that context, creeping jurisdiction has been referred to as “parcellation”,<sup>19</sup> “propertization”,<sup>20</sup> and “territorialization of the oceans”

via unilateral declaration of “psycho-legal boundaries at sea”.<sup>21</sup> Those are unquestionably powerful phrases, which lay bare their author’s stance: angst that the freedom of the seas would be at stake.<sup>22</sup>

In light of the considerations *supra*, it seems relevant to, even more than three decades into the signature of the Convention, consolidate a Southern narrative for the law of the sea. In particular, it seems relevant to dispute the mainstream account that coastal state jurisdictional expansion seawards happened as the result of a vile act of creeping jurisdiction in maritime zones that otherwise would be free to all and benefit the entire world. It should be born in mind at all times that that “freedom” is a relative capacity, i.e. only those financially powerful and technologically advanced had the choice to navigate large parcels of the world oceans, explore and exploit its natural resources. Without significant funds, freedom was but a catch phrase – and was that the reality of several developing coastal states.

A first step in that quest is to challenge the pejorative meaning and use of the phrase “creeping jurisdiction”. Next, it is imperative to inspect the Brazilian state practice until 1973 and the official positions adopted by the Brazilian delegation during the III UNCLOS, with the purpose of debunking misconstructions of Brazil as a destabilizing actor within the international community. Portraying Brazil as the leader of “territorialists” is not the problem *per se*. It becomes a problem when the quest for exclusive access to natural resources and, thus, to social, environmental and economic development, is associated with territorialism, understood as a corrosive practice to the stability of the public ocean order.

14 A definition of maritime space (or area, or zone) in the law of the sea is given by Treves as “areas of the sea for which international law prescribes spatial limits and a regime”. In each area, different categories of states exercise different rights, most of which are comprised under the UN Convention on the Law of the Sea. TREVES, Tullio. Coastal States’ rights in the maritime areas under UNCLOS, p. 40

15 In general, one could refer to the quest for enhanced power and authority as an inherent and essential feature of sovereign states, being that one of the reasons for the existence of international law, as a limiting tool to state expansionism in different ambits of international relations.

16 As referred by John Craven, once Chief Scientist of the US Navy. For that reason, the practice of creeping jurisdiction is also known as *Craven’s Law*, as referenced in BURKE, William. Law, Science, and the Ocean. **Natural Resources Law**, vol. 3, 1970, p. 215 note 41.

17 KAYE, Stuart. Freedom of navigation in a Post 9/11 World: security and creeping jurisdiction. In: **Law of the Sea: progress and prospects**. Oxford: OUP, 2006, p. 347.

18 To Erik Frankx, the expression “creeping” “includes the idea of *unilateral* action directed at *upsetting a legal framework* adhered to by the *majority* of other States”. Besides, for a detailed view on the origins of the expression “creeping jurisdiction”, see FRANCKX, Erik. The 200-Mile Limit: between creeping jurisdiction and creeping common heritage. **German Yearbook of International Law**, 48, 2005, p. 136.

19 BROWN, Edith. Maritime Zones: A Survey of Claims. In: CHURCHILL, Robin, Simmonds K. R. and WELCH Jack (Eds.). **New Directions in the Law of the Sea**. London: The Eastern Press, Ltd., 1973, pp. 157-192.

20 Gary Knight uses this expression in the context of discussions on the most adequate regime to deep-sea mining, so as to make a point that a system of *free enterprise and minimal regulation* would be best tailored for the exploitation of deep seabed minerals. In so

doing, states would rely on the “propertization” of the seabed to develop a regime that would recognize property rights over seabed resources. See KNIGHT, Gary. **Legal Aspects of Current United States Law of the Sea Policy**. Paper presented to AEI conference, October 19, 1981, p. 13.

21 BOOTH, Ken. Naval Strategy and the Spread of Psycho-legal Boundaries at Sea. **International Journal**, vol. 38, n. 3, Ocean Politics, 1983, pp. 373-375.

22 Consternation with the expansion of coastal state jurisdiction nowadays is expressed by Bernard Oxman, who calls into question the very stability of the jurisdictional system reached at UNCLOS, as the author analyzes episodes of excessive claims after the adoption of the Convention. See OXMAN, Bernard H. Territorial Temptation: a siren song at sea. **The American Journal of International Law**, vol. 100, n. 4, 2006, pp. 833-837.

### 3. WHAT IS WRONG WITH THE PHRASE “CREEPING JURISDICTION”?

Traditional law of the sea scholarship tends to share two grounding premises for proclaiming the viciousness of all kinds of jurisdictional creep: firstly, that freedom of navigation is an overriding principle, one that precedes all others, the long-standing heart of the law of the sea;<sup>23</sup> secondly, that coastal states are inherently attracted to increased power and authority<sup>24</sup> and, as such, are doomed to always pursue enlarged jurisdiction over maritime spaces. There is little room for challenging the second premise, especially if one considers states to be rational and self-interested agents.<sup>25</sup> However, that first premise should not go undisputed, particularly because of freedom's trait as “the” core element in traditional law of the sea. In fact, “freedoms of the high seas are freedoms under the law. They should be viewed increasingly as no different from other fundamental rights of States under international law”.<sup>26</sup>

The main problem with the widespread phrase “creeping jurisdiction” is that it does not neutrally depict the claims of coastal states prior to the adoption of UNCLOS.<sup>27</sup> That expression is value-laden and describes a wicked practice, which may not be the case of the systematic opposition to the *ordre publique* of the oceans before 1982. Anne Peters, in a sharp critique against the

once fashionable alarmism amongst internationalists as to the “fragmentation” of international law, pondered that “the term ‘fragmentation’ is inevitably descriptive-evaluative, and thus loaded. ‘Fragmentation’ has a predominantly negative connotation, it is a pejorative term (rather than diversity, specialization, or pluralism). Finally, it is a term which describes not only a legal process in the real world of law but has also been a label for the accompanying discourse (mostly among academics, less among judges, and even less among political law-making actors)”.<sup>28</sup>

Replace the phrase “fragmentation” by “creeping jurisdiction” and the resulting text would make as much sense. In fact, the notion of creeping jurisdiction is descriptive-evaluative, assuming a rather negative connotation. It is a term that describes not only a behavior by coastal states, but has been used as a label to raise apprehension to an allegedly disorder-creating movement in the law of the sea – a view that takes long-established customary laws and the pre-UNCLOS order for absolute, which was by far not the case.<sup>29</sup>

The verb “to creep” in the language of Shakespeare means “to enter or advance gradually so as to be *almost unnoticed*”. As an adjective, it means “advancing by slow, imperceptible degrees”.<sup>30</sup> A similar connotation includes “happening very slowly so that people *do not notice*”,<sup>31</sup> which, if applied to the rule of ocean law, underscores the surreptitious way in which jurisdictional assertions by coastal states would occur. It would perhaps make sense to describe some excessive claims effected after the adoption of UNCLOS, but it fails to comprehend the systematic antagonism of coastal states both to the traditional dual division of oceans and to the dominance of an unfair freedom of the seas.

23 See BECKER, Michael A. The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea. *Yale Law Review*, 2005, p. 132. See also LAGONI, Rainer. Marine Protected Areas in the Exclusive Economic Zone. In: KIRCHNER, Andre (Ed.), *International Marine Environmental Law: institutions, implementation and innovations*. Kluwer Law International, 2003, pp. 157-167. See also KRASKA, James. ... , p. 148. Kraska is of the view that the coastal states and distant water states have sets of absolute rights in the EEZ.

24 Maria Gavouneli speaks of coastal State's “tendency to expand seawards”. See GAVOUNELI, Maria. *Functional Jurisdiction in the Law of the Sea*. Nijhoff, 2007, p. 59.

25 That states are rational agents, which always act so as increase their absolute power capacities, is the core of realist and rational choice theories of international relations. See GOLDSMITH, Jack L. and POSNER, Eric A. *The Limits of International Law*. Oxford: OUP, 2005, p. 5.

26 ANDERSON, David. Freedom of the High Seas in the Modern Law of the Sea. In: *The Law of the Sea: progress and prospects*. Oxford: OUP, 2006, p. 345.

27 It is beyond the object of this paper to analyze the accusations of creeping jurisdiction and territorialism by coastal states after the adoption of the UNCLOS, not for lack of thematic pertinence, but for lack of space. Such an analysis is being carried out in the author's doctoral research at the University of Hamburg.

28 PETERS, Anne. Refinement of International Law: from fragmentation to regime interaction and politicization. *MPIL Research Paper Series*, n. 2016-19, 2016, p. 2.

29 Cases of Latin American objection to the then valid customary legal order of the oceans began as early as 1947, with the famous Chilean Declaration. A thorough list of unilateral state acts and multilateral declarations can be found in GARCÍA-AMADOR, The Latin American Contribution to the Development of the Law of the Sea. *American Journal of International Law*, 68, n. 33, 1974, p. 33.

30 Merriam-Webster Dictionary. Entry “Creeping”. Available at: <https://www.merriam-webster.com/dictionary/creeping>. Last visited on 24.09.2017.

31 MacMillan Dictionary. Entry “Creeping”. Available at: <http://www.macmillandictionary.com/dictionary/british/creeping>. Last visited on 24.09.2017.

It is no novelty that countries performing the staunchest objection to the jurisdictional expansion of coastal states are mainly located in Europe and North America.<sup>32</sup> Coincidentally, authors denouncing the “expansionist movement” prior to UNCLOS originate or have been trained in those regions. Ironically though, the founder of the expression “creeping jurisdiction” was an American. When John Craven coined the phrase during the 1960’s, the US Navy revealed profound concern with jurisdictional assertions by coastal states to rights not just over the seafloor and subsoils of the continental shelf (as the US had done in 1945), but over the water column as well. Only then, alarm was sounded with an edge of seriousness. In other words, as long as the unilateral expansion seawards was limited to the seabed, there was little reason to bother.<sup>33</sup> However, once territorialization meant restrictions to freedom to research, fish and, potentially, to navigate (note, *potentially*), the phenomenon sparked uneasiness amid maritime states.

As it seems, such protestation would be the reflex of a hegemonic narrative, in which a particular actor “seeks to make its particular project or interest or pursuit seem the general project or interest”.<sup>34</sup> The universalizing of the freedom of the seas principle alongside the demonization of creeping jurisdiction indicate the defense of a particular political order of the oceans. Here, the concept of “universalization vocabulary”, by Martti Koskenniemi,<sup>35</sup> seems particularly helpful to an analysis

of the reiterate use of the expression “creeping jurisdiction” in law of the sea monographies. In fact, maritime powers have been claiming to have the *correct* understanding of significance and scope of jurisdiction rules in the law of the sea.<sup>36</sup> Such particular understating is expected (by their holders) to be universal, as it allegedly derives from human nature and human reason – in a dangerous process of naturalizing legal norms. This rather authoritarian view denies the plurality of *topoi* based on which international legal argumentation is made possible.<sup>37</sup> A major problem lies, thus, on the judgmental nature of legal analyses about Latin American “jurisdictional creeps” onto the high seas. This view ignores that international law has always been and will continue to be, in essence, a battlefield for competing understandings and opposing interpretations of certain rules – jurisdiction in the law of the sea being no exception.

For the purposes of this article, the kind of disorder that happens to promote general fairness and justice is

32 The United Kingdom and the The Netherlands, for instance, oppose the interpretation of UNCLOS according to which coastal states may forbid military exercises on their EEZs. On another level, the US were the only country to present a *note verbale* to the Commission for the Limits of the Continental Shelf (CLCS) pending the analysis of the Brazilian submission for delineating the outer limits of the continental shelf. If anything, such object shows concerns by the naval superpower with potential territorial jurisdiction of the Brazilian state on the South Atlantic.

33 True, there had been some reaction against the extension of coastal state jurisdiction over the continental shelf within the US, as in KUNZ, Joseph L. Continental shelf and international law: confusion and abuse. *American Journal of International Law*, 50, 1956, pp. 828-853 and HENKIN, Louis. International law and “the interests”: the law of the seabed. *American Journal of International Law*, 63, n. 3, 1969, pp. 504-510. However, such opposition is not comparable in intensity with the critiques against the expansion of coastal state jurisdiction over the water column.

34 KOSKENNIEMI, Martti. International Law in Europe: between tradition and renewal. *European Journal of International Law*, 16, pp. 113-124, 2005, p. 115.

35 KOSKENNIEMI, Martti. Hegemonic Regimes. In: YOUNG, Margaret (Ed.). *Regime Interaction in International Law: facing fragmentation*. CUP, 2012, p. 311.

36 On the military level, an example of such universalization can be found in a letter from Admiral Jay L. Johnson of the U.S. Navy to Senator Jesse Helms. The then Chief of Naval Operations stated that “it is the U.S. Navy and not the Convention that guarantees the navigational freedoms upon which we *and the rest of the world* depend for peace, stability, and economic prosperity” (emphasis added). See Letter from Chief of Naval Operations Admiral Jay L. Johnson to the Hon. Sen. Jesse Helms, Chairman, Senate Foreign Relations Committee, Jun. 29, 2000. Available at: <http://www.virginia.edu/colp/pdf/ADMJohnsonLtr-Chariman-Helms.pdf> For more on the letter, as well as on the U.S. Navy views on coastal state powers in the EEZ, see KRASKA, James. *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics*. Oxford: OUP, 2011, pp. 134-149.

37 A rhetorical view of international law sees moral values and judgments behind the pretended assertiveness of positive law and focuses on the study of the so-called *topoi*, or places, or cultural (relative) elements, which influence the perception of law that a nation has. On the legal level, Rhetorics as a methodology originates from the *rethorical turn*, in light of the limitations faced by the Kelsenian objectivist theory of law. At that time, Theodor Viehweg emerged as one of the main exponents of the argumentative theory, conceiving Jurisprudence, the object of legal science, as a procedure for discussing problems. For the rhetorical reasoning, the starting line is no longer the blackletter of the law, but the controversial principles, or *topoi*, that directly influence legal interpretation. This makes Rhetorics known for operating in the field of legitimacy (not of positive legality), in which it seeks the uncoercive persuasion as to certain world views. Those views do not assume a cogent nature, as it happens with the legal positivism, since they are located in the domain of *dubium*, the uncertain. For more on the rhetorical turn, see VIEHWEG, Theodor. *Tópica y Jurisprudencia*. Madrid: Civitas, 2007, p. 149. Thus, it seems perfectly possible to establish a parallel between Rhetorics and the functioning of international law, especially because the Kelsenian objectivist theory is not best suited for the job of explaining how international law works.



justifiable, and the pre-UNCLOS legal regime of absolute prevalence of the freedom of the seas over coastal states' jurisdiction was all but fair.<sup>38</sup> Customary law disciplining access to marine resources did not take into account the special needs of developing and least developed coastal states. General dissatisfaction with the ruling order was such that negotiating parties to the UNCLOS III dedicated a paragraph of the Convention's Preamble to highlight State parties' commitment to the "maintenance of peace, justice and progress for all peoples of the world".<sup>39</sup> The Convention was negotiated on the widely shared assumption that the pre-UNCLOS economic (and oceanic) order was inadequate, what made a just and equitable international economic order due.<sup>40</sup> Needless to say, the new order ought to take particular note of the special interests and needs of developing countries. To that purpose, Brazil were among the most proactive countries to engender efforts during the UNCLOS III negotiations and to push for a "new" law of the sea.

#### 4. BRAZILIAN PRACTICE BETWEEN 1945 AND 1982

Throughout history, Brazil has not always been the "bogyman" of the law of the sea. In general terms, the country has been an active participant to international oceanic negotiations, having ratified most of the treaties both in the law of the sea and maritime law. The large number of international instruments signed and ratified by the Brazilian state signify the country's dedication to the international rule of law applied to oceans. Examples of those instruments are the following. On the

conservation of marine living resources: Convention for the Regulation of Whaling, Washington 2 December 1946;<sup>41</sup> Convention on the Conservation of Tuna and Related Fish of the Atlantic, Rio, 14 May 1966;<sup>42</sup> on May 16, 1975, Brazil adhered to the Antarctic Treaty, Washington, December 1, 1959.

Regarding maritime, shipping and navigational affairs, Brazil has signed and ratified the following instruments: Convention on the Safeguarding of Human Life at Sea (SOLAS) and the Rules to Prevent Collision at Sea, London 5 1960;<sup>43</sup> Convention on Civil Liability for Damage Caused by Oil Pollution, Brussels, November 29 1969;<sup>44</sup> Convention on International Regulations to Avoid Collisions at Sea, London, 20 October 1972;<sup>45</sup> Convention for the Facilitation of International Maritime Traffic, London, 9 April 1965; Convention on Cargo Lines, London, 5 April 1966;<sup>46</sup> Convention for the Prevention of Pollution Caused by Ships (MARPOL), London, 2 November 1973, and the respective Protocol, signed on 17 January 1978;<sup>47</sup> and potentially others not central to this paper.

Concerning the country's notoriety for advancing excessive territorialist claims, it must be borne in mind that, in the decades preceding the UNCLOS' signature, Brazil either upheld the three-mile territorial sea or pressed for a limit not broader than twelve miles. That stance abruptly changed in the wake of international developments, so as to adapt to international power struggles and to strategical considerations made at the domestic level, in particular with regard to national security preferences and the conservation and exploitation of marine resources.

##### 4.1. The five Brazilian stances on coastal state jurisdiction before 1973: The U-Turn

Until 1973, there were five identifiable periods in the Brazilian positions concerning the *length* of maritime spaces over which the state exercised some degree of jurisdiction.<sup>48</sup> During the first period, spanning from

38 For a valuable concept of fairness in international law, see TOURME-JOUANNET, Emmanuelle. **What is a Fair International Society?** International Law Between Development and Recognition. Oxford: Hart Publishing, 2013, pp. 1-4.

39 "Prompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world." UNCLOS, **Preamble**, UNTS 1833, 34, 35, 10 December 1982.

40 "Bearing in mind that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked". UNCLOS, **Preamble**, UNTS 1833, 34, 35, 10 December 1982.

41 Promulgated by Decree No. 73.497, 17 January 1974.

42 Promulgated by Decree No. 65.026, 20 August 1969.

43 Promulgated by Decree No. 60.696, 8 May 1967.

44 Promulgated by Decree No. 79.437, 28 March 1977.

45 Promulgated by Decree No. 80.068, 2 August 1977.

46 Promulgated by Decree No. 66.103, 22 January 1970.

47 Approved by Legislative Decree No. 4, 1987.

48 This temporal taxonomy was drafted by RANGEL, Vicente Marotta. Brazilian Law of the Sea. **Revista de Direito da Univer-**



the Brazilian formal independence in 1822 until 1914, Brazil enforced a former Portuguese provision on coastal state sovereignty over the adjacent seas, the famous “cannon-shot rule”.<sup>49</sup> The rule was then replaced in 1914 by the more modern three-mile rule, which was first provided for by Instruction No. 43 of the Ministry of Foreign Affairs of August 25 of that year.

The three-mile rule was upheld by the Brazilian state, but not without questioning. In fact, during the 1930 Codification Conference, the Brazilian delegation pushed for the enlargement of the territorial sea, so as to allow the state more regulatory and administrative maneuver room over an important sea belt so close to the mainland. Consequently, the Brazilian delegation favored a six-mile territorial sea during the Conference.<sup>50</sup>

Since the first half of the twentieth century, there had been dissatisfaction with the pre-UNCLOS dual-division of the oceans.<sup>51</sup> As Fraser wrote in 1926, “one country will claim three miles, another four miles, another six miles”, with such diversity resulting in harmful effects to international trade and political relations.<sup>52</sup> The likelihood of conflicts led delegates of 47 states to meet in The Hague in 1930 with the arduous task of codifying and developing international law in several fronts, not only in oceanic matters.<sup>53</sup> Three topics were at the table, amongst which the codification of territorial waters, its limits and competences therein.

However, codification efforts stranded. So, the Brazilian government established a 12-mile contiguous zone, valid also to exclusive fishing.<sup>54</sup> Failure to codify an internationally agreed instrument led, as mentioned supra, to the Truman Proclamations. The rest of the story is relatively well known. In short, several Latin

American states took a similar course of action and declared some degree of jurisdiction over their adjacent seas, triggering a phenomenon that McDorman names “the great expansion of coastal state jurisdiction.”<sup>55</sup>

Following the US Proclamations, there was a sequence of three short-lived periods in Brazilian positions. In 1950, Brazil declared that its continental shelf was an integral part of the national territory.<sup>56</sup> The Federal Constitution of 1967 also provided that the “submarine shelf” be listed as *property* of the federal state.<sup>57</sup> This period marks the birth of a gradual detachment from the 3-mile territorial sea rule, particularly in light of on-going discussions on the need for an internationally binding instrument on the delimitation of maritime zones, so as to prevent anarchy in the seas.

Thus, the third period began in 1966 and was characterized by a 6-mile territorial sea plus 6-mile contiguous zone.<sup>58</sup> Although the contiguous zone was established for the purposes of customs, fiscal, sanitary and immigration matters, Brazil had therein the same rights of fishing and exploration of living resources enjoyed in the territorial sea. Shortly after that, in 1969, Brazil enlarged the territorial sea “to a belt of twelve nautical miles breadth, measured from the low water line”.<sup>59</sup>

The “straw that broke the camel’s back”, the move that rendered Brazil’s fame as “leader of territorialists”, was the proclamation of a 200-mile territorial sea in 1970.<sup>60</sup> Before that, Brazil was the only country in South America that had not declared a 200-mile jurisdiction zone – only as late as 1966 had Brazil replaced the three-mile territorial sea rule.<sup>61</sup> Until then, the country

cidade de São Paulo, pp. 71-89, 1973, p. 74.

49 The legislation on the cannon-shot was adopted in Lisbon, via Decree of 4 March 1804.

50 RANGEL, Vicente Marotta. Brazilian Law of the Sea. *Revista de Direito da Universidade de São Paulo*, pp. 71-89, 1973, p. 75.

51 Already then, during the first half of the twentieth century, the international community had identified pressing issues connected to ocean uses, in special the degree of coastal state powers offshore and the over-exploitation of high seas fisheries, both intimately intertwined.

52 FRASER, Henry S. Extent and Delimitation of Territorial Waters. *Cornell Law Quarterly*, 11, 1925, p. 457.

53 The Conference was convoked by the League of Nations. See League of Nations, *Official Journal, Special Supplement*, No. 21, at 10.

54 Fishing Code, approved by Decree No. 23.672 of January 2, 1934.

55 MCDORMAN, Ted L. *The marine environment and the Caracas Convention on the Law of the Sea: a study of the third United Nations Conference on the Law of the Sea and other related marine environmental activities*. Halifax: Dalhousie University Press, 1981, p. 2.

56 Provided for in Decree No. 26.840 of November 8, 1950.

57 Article 4 (3), Federal Constitution, 24 January 1967.

58 Brazil: Decree-law No. 44 of November 18, 1966

59 Decree-law No. 553 of April 25, 1969.

60 Decree-law No. 1.098 of March 25, 1970; approved by Congress by means of legislative Decree No. 31 of May 27, 1970.

61 The first Latin American states to forward national claims to expanded jurisdiction seaward were bathed by the Pacific Ocean, in particular Chile. In that sense, early unilateral jurisdictional assertions had a “compensatory nature”, since those states has narrow continental margins and were, thus, negated the sort of riches secured under the Truman Proclamation. See POHL, Reynaldo Galindo. The Exclusive Economic Zone in the Light of the Third United Nations Conference on the Law of the Sea. In: VICUÑA, Francisco Orrego (Ed.). *The Exclusive Economic Zone: A Latin*

was willing to push carefully for an enlarged contiguous zone, a perception that changed for political and economic reasons. Politically, the military regime gained stability and overcame the turbulence following the deflagration of the 1964 coup d'état that overthrew the elected President João Goulart. Economically, a series of geological surveys carried out by Petrobras on the East coast, within 150 miles from Rio de Janeiro, revealed hydrocarbon reserves. Uncertainty as to the precise location of these reserves may have been yet another reason for declaring a 200-mile territorial sea.<sup>62</sup>

In conjunction with the militaries' ascension to power, came a stronger emphasis on sovereignty requirements for the protection and international projection of the nation, added to the plan to increase decision-making autonomy of the Brazilian foreign policy. Those were pillars of the "Brasil Grande Potência" policy, defended by the regime.<sup>63</sup> Archives of the Brazilian Ministry for Foreign Affairs host eleven notes repudiating that unilateral decision, all of which from developed countries: Belgium, Finland, France, Germany, Greece, Japan, Norway, United Kingdom, Federal Republic of Germany, Sweden and the Soviet Union.<sup>64</sup>

The next step was to deny accession to the 1958 Geneva Conventions. On the one hand, this decision could be seen "legally feasible",<sup>65</sup> as Brazil was not party to any treaty on the issue of maritime delimitation. However, it could also be argued that customary law has been established on a length between three and not farther than twelve nautical miles from the baselines. In so doing, Brazil relied on the pressing need for ensuring productivity of its marine natural resources, namely fisheries and particularly in light of growing exploitation by foreign fishing vessels.<sup>66</sup> The technical abyss in

the fishing industry between developed and developing countries was to be felt with a particular note, as the "Lobster War" with France in 1963 denoted.<sup>67</sup>

The declaration of a 200-mile territorial sea was a lucid decision, one taken upon strategical security considerations. The main reason behind it is simple: a 200-mile belt was the space the Brazilian Navy appraised as necessary for the maintenance of national security. The government understood that a twelve-mile territorial sea, even if supplemented by fishing agreements, "could hardly lead to the modification of this negative outlook".<sup>68</sup> In addition to the security thoughts, Brazil sensed the need to reinforce solidarity bonds with neighboring Latin American countries, which had for decades adopted national legislation designing some sort of 200-mile zone.<sup>69</sup>

This quick overview of the Brazilian positions in the decades preceding the UNCLOS negotiations and the

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the coasts of Peru and Ecuador and to what still happens on the coasts of Brazil". As referenced in RANGEL, Vicente Marotta. Brazilian Law of the Sea. *Revista de Direito da Universidade de São Paulo*, pp. 71-89, 1973, p. 79.

67 The "Lobster War", with France, was a quarrel involving cabinet talks, exchanges of notes, and even complicated interpretations of how lobsters behave in their natural habitats. The whole episode centered around the following arguments: Frenchmen argued that they were fishing off the territorial sea, whereas Brazilians countered that despite the 3-mile territorial sea, fishing occurred on the continental shelf. See CARVALHO, Gustavo de Lemos Campos. O mar territorial brasileiro de 200 milhas: estratégia e soberania, 1970-1982. *Revista Brasileira de Política Internacional*, n. 42, pp. 110-126, 1999, p. 114.

68 RODRIGUEZ, Carlos Calero. O Problema do Mar Territorial. In: *Mar Territorial*, vol II, Ministry of Navy, Brasília, 1972, p. 576.

69 The first concerted effort at the international level was headed by Chile, Ecuador and Peru, and resulted in the *Declarations of Santiago*, adopted in 1952. In the first Declaration, concerning fishing problems in the South Pacific, all parties show consternation with the "lack of protection which endangers the conservation of fishing resources" and the "serious threat of exhaustion" of those resources offshore. By acknowledging an *urge* to exercise prescriptive and enforcement jurisdiction relating to the conservation of fisheries, the parties to the Declaration set off to "ensure a better yield for the benefit of national food supplies and economics". **Joint Declaration Concerning Fishing Problems in the South Pacific**, signed at Santiago on 18 August 1952. UNTS 1006, p. 318-9. equally important is the 1970 Montevideo Declaration on the Law of the Sea, signed by nine Latin American states in a combined effort to promote acceptance of their 200-mile claims by creating a *regional consensus* on the matter. **The Declaration of Montevideo on the Law of the Sea**, 9 I.L.M., no. 5, ASIL, pp. 1081-1083, signed on 8 May 1970. Argentina, Brazil, Chile, Ecuador, El Salvador, Nicaragua, Panama, Peru, and Uruguay signed the Montevideo Declaration on the Law of the Sea. For more on this, see GARCÍA-AMADOR, The Latin American Contribution to the Development of the Law of the Sea. *American Journal of International Law*, 68, n. 33, 1974, p. 34, note 5.

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**American Perspective.** Foreign Relations of the Third World, n. 1, Boulder: Westview Press, 1984, p. 34.

62 Revista *Veja*, São Paulo, 09 June 1971, p. 27.

63 CARVALHO, Gustavo de Lemos Campos. O mar territorial brasileiro de 200 milhas: estratégia e soberania, 1970-1982. *Revista Brasileira de Política Internacional*, n. 42, pp. 110-126, 1999, p. 110.

64 See CASTRO, Luiz Augusto de Araújo. **O Brasil e o Novo Direito do Mar: Mar Territorial e Zona Econômica Exclusiva**. Brasília: FUNAG, 1989, p. 30.

65 See RANGEL, Vicente Marotta. Brazilian Law of the Sea. *Revista de Direito da Universidade de São Paulo*, pp. 71-89, 1973, p. 78.

66 According to the Brazilian Navy Vice-Admiral Paulo Irineu Roxo de Freitas, "the devastation provoked by foreign fishing fleets in certain regions of the coast of Africa has already caused the extinction of ichthyological species, similarly to what had happened on

relevance that the ocean has to the Brazilian reality offer necessary elements for an enhanced understanding of the array of positions defended by the country between 1973 and 1982. As seen above, Brazil widened the limits of its territorial sea, first to six, then to twelve<sup>70</sup> and finally to two hundred nautical miles.<sup>71</sup> As a developing country with a long coastline and sensitive interests in the economic, sovereignty, scientific and environmental facets of the oceans, Brazil participated intensely in the negotiations leading to the approval of the Convention in Montego Bay on 10 December 1982.

#### 4.2. Brazilian positions during the III UN Conference on the Law of the Sea: questioning maritime hegemonisms

The III UNCfLOS was negotiated in three main committees.<sup>72</sup> Of those, the Second Committee was mandated to elaborate on jurisdiction and maritime zones, including the EEZ and continental shelf. Unsurprisingly, that panel witnessed heated debates over three main thorny issues: recognition of the rights claimed by states whose continental shelf extended for more than 200 miles; the system of payments and contributions provided for in article 82 of the negotiating text; and a solution to the aspirations of the land-locked and geographically disadvantaged countries. The aim was, thus, to construct a legal framework capable of preventing or settling disputes originating from the extension of territorial waters and the adoption of the concept of the economic zone, as well as from the delimitation between the continental shelf and the international area. At the end of the day, negotiations were needed because “where there had previously been a single jurisdiction there would be a plurality of powers, giving rise to new conflicts”.<sup>73</sup>

During the Conference, Brazil prioritized the promotion of self-interests, amongst others: *national security*, via extending the length of the waters where coastal states exercise a considerable authority; *socioeconomic development*, via guaranteeing exclusive access to marine resources both over a 200-mile zone and an even larger portion of the seafloor, which would extend beyond 200nm; *geopolitical influence*, via defending a solidarity-based approach to the resources of the deep-sea beyond national jurisdiction.<sup>74</sup> In so doing, Brazil joined forces with different constellations of negotiating parties, sometimes closer to broad-margin developed states, sometimes show more affinity with developing states, depending on the topic under discussion.<sup>75</sup>

For instance, as official discussions started in 1973, there was an international outcry for a larger zone under some amount of national jurisdiction.<sup>76</sup> Such concept would be later labelled the Exclusive Economic Zone (EEZ). To the purpose of consolidating such a zone, Brazil joined an informal group of countries that later would be known as the “club of pioneers”.<sup>77</sup> Not that Brazil had been a “pioneer”, since it had made no bald unilateral assertions until 1966. What Brazil did was to jump onto the passing tram, adding plenty of *momentum* to claims that would have otherwise remained weak and unorganized, without support of larger developing

74 During UNCLOS III negotiations, Brazil had the following Ministers for Foreign Affairs: Mário Gibson Barbosa (1969-1974), Azeredo da Silveira (1974-1979) and Ramiro Saraiva Guerreiro (1979-1985).

75 For a critical position against the Brazilian standing during UNCLOS III, for having favored excessively interests of developed nations, see IMBIRIBA, Maria de Nazaré Oliveira. **Do princípio do patrimônio comum da humanidade**. São Paulo. PhD Thesis. Law Faculty, University of São Paulo, 1980, p. 106.

76 For a list of Latin American national laws, together with sub-regional declarations advancing the 200-mile zone, see GARCÍA-AMADOR, The Latin American Contribution to the Development of the Law of the Sea. **American Journal of International Law**, 68, n. 33, 1974, p. 33.

77 According to Pohl, the group of pioneers was composed by Central and South American states, which between 1947 and 1967, claimed more than a 3-mile jurisdictional zone offshore. Those pioneers “mounted a generally weak and largely uncoordinated effort at the 1958 Conference on the Law of the Sea. There were so few of them that they were on the defensive. Latin America’s voices were isolated, submerged, and drowned out in an atmosphere in which the overwhelming strength of the European masters of international law was seen in one of its last displays”. POHL, Reynaldo Galindo. The Exclusive Economic Zone in the Light of the Third United Nations Conference on the Law of the Sea. In: VICUÑA, Francisco Orrego (Ed.). **The Exclusive Economic Zone: A Latin American Perspective**. Foreign Relations of the Third World, n. 1, Boulder: Westview Press, 1984, p. 35.

70 Decree-Law 553, of 25 April 1969.

71 Decree-Law 1.098, of 25 March 1970. This Decree was implemented by Executive Decree n. 68,459 of 1971, which established two fishing zones of 100 mm each, the first - except for special cases not stated - for fishing only for Brazilians, while the second allowed fishing by foreigners, provided that they were authorized by the country.

72 The committees dealt respectively with the deep-seabed regime, the traditional law of the sea, the protection of the marine environment, marine scientific research and transfer of technology and the informal plenary dealing with the settlement of disputes and general and final clauses.

73 A/CONF.62/SR.59 59th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume V.



countries and newly independent African states.<sup>78</sup>

However, on the same EEZ, Brazil made clear a position against the legality of military maneuvers with the use of weapons and explosives without consent of the coastal state. In fact, the country strived for the Convention to be more unequivocal on the rights and duties of states within the EEZ, so that “military activities such as maneuvers with the use of weapons and explosives should not be carried out in the zone without the consent of the coastal State”.<sup>79</sup> The deployment of military installations and devices on the continental shelf would, thus, be subject to prior consent, a move that would represent a stark drawback against powerful navies worldwide. In this regard, Brazil assumed a leading role in seeking the expansion of coastal state powers over the maritime zones under national jurisdiction.

To that end, Brazil has made a reservation upon signature of the UNCLOS.<sup>80</sup> For the country, the EEZ must be governed by the principle of utilization for exclusively peaceful purposes, a view which conflicts with the interpretation given by military naval powers, to whom military drills may have a peaceful purpose. On this regard, a most sensate stance is espoused by Pohl, to whom there is immense difference between navigation of military vessels, which falls under the right of innocent passage, and naval maneuvers or ostensive naval presence offshore, contemplating the installation of sensing apparatus, arms testing, and other activities that may be perceived as threats to national security.<sup>81</sup>

Another bone of contention during negotiations,

and even after them, was the coastal state’s power over artificial installations and structures in the EEZ and on the continental shelf. The Brazilian interpretation of such right was rather ampliative and saw exclusivity of the Brazilian state to “construct and to authorize and regulate the construction, operation and use of *all* types of installations and structures, *without exception*, whatever their nature or purpose”.<sup>82</sup> In other words, the coastal state has full discretion as to any islands, installation and structures present in its EEZ, and not just in physical contact with the continental shelf. This comprehensive position may be viewed by some as being in violation of UNCLOS Article 56 (1) (b) (i), which does not mention “all” islands, installations and structures. This matter is highly polemic and subject to differing interpretations until the present day.

A bold stance embraced by the Brazilian delegation related, also, to the enforcement jurisdiction of the coastal state over the EEZ. For Brazil, the Convention should concede enforcement powers to the coastal State with regard to *all* rights referred to in article 56, not merely to rights over living resources.<sup>83</sup> According to the Brazilian delegation, a coastal State should be entitled to exercise its sovereign rights over the non-living resources of its economic zone as well. The aim was to include energy resources under the exclusive economic jurisdiction of coastal states, such as wind, wave and solar energy.<sup>84</sup>

Apart from that, a spotlight struggle concerned the freedom of scientific research on the continental shelf beyond 200nm. Although the continental shelf regime was negotiated to be unitary (with rules and duties that apply equally to the continental shelf with and beyond 200nm), some countries backed up a proposal to loosen coastal states’ rights in favor of researching states. According to the architects of such proposal, the move would “liberalize” the regime of the continental shelf beyond 200nm, so as to allow for a balance between rights of researched and researching states.<sup>85</sup>

78 Concerning the EEZ, political positions embraced by Latin American states were backed nationally by academics. Renowned scholars boosted the EEZ as feasible solution for a reinvigorated ocean order, amongst them Orrego Vicuña, Marotta Rangel, Teresa Infante, García-Amador, Reynaldo Galindo Pohl, Hugo Caminos, and others.

79 A/CONF.62/C.2/SR.53 53rd meeting of the Second Committee Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume IX, para. 3.

80 Paragraph V of the Brazilian Reservation to the UNCLOS: “The Brazilian Government understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone military exercises or manoeuvres, in particular those that imply the use of weapons or explosives, without the consent of the coastal State”. **Brazilian Declaration Upon Signature of the UNCLOS**, Montego Bay, 10 December 1982.

81 POHL, Reynaldo Galindo. *The Exclusive Economic Zone in the Light of the Third United Nations Conference on the Law of the Sea*. In: VICUÑA, Francisco Orrego (Ed.). **The Exclusive Economic Zone: A Latin American Perspective**. Foreign Relations of the Third World, n. 1, Boulder: Westview Press, 1984, p. 55.

82 Paragraph V, **Brazilian Declaration Upon Signature of the UNCLOS**, Montego Bay, 10 December 1982.

83 A/CONF.62/C.2/SR.53, para 9.

84 A/CONF.62/SR.104 104th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume IX, para 21.

85 USA, Sweden, Federal Republic of Germany, Italy, Hungary etc. See records of the 126<sup>th</sup> plenary meeting of the 2<sup>nd</sup> Committee. For the Hungarian delegation, the freedom of scientific research would only be effected if a *specific* research regime be established for



The Federal Republic of Germany, for instance, held that a restrictive provision on scientific research within and beyond 200nm would hamper the development of every marine scientific research (MSR) – a negative outcome for the international community. According to declarations by the Federal German delegation, it was in the “general interest” to promote marine scientific research, which depended heavily on cooperation and efforts by all states.<sup>86</sup> With that, the country stood out as one of the staunchest opponents to the Brazilian position on marine scientific research. A similar stance was embraced by the Swedish delegation, to whom marine scientific research in the economic zone and on the continental shelf beyond 200nm should be subject to only a few restrictions.<sup>87</sup>

Brazil considered proposals for a different regime for marine scientific research on the continental shelf beyond 200nm as an attempt to undermine coastal states’ rights.<sup>88</sup> For that reason, it continuously opposed any such attempts,<sup>89</sup> and defended a *uniform regime of consent* both for the EEZ and the continental shelf. In that, the country was supported by other broad-margin states, namely Argentina,<sup>90</sup> Ecuador,<sup>91</sup> Guyana,<sup>92</sup> New

Zealand, Uruguay,<sup>93</sup> the Philippines,<sup>94</sup> Mozambique,<sup>95</sup> and others. Of those, Uruguay considered the “liberalization” to amount in practical terms to the “derogation” of the *rule of consent* for research in the EEZ and on the continental shelf.<sup>96</sup> Those states claimed right or discretion over scientific research on the continental shelf, both within and beyond 200nm.<sup>97</sup>

Opposing the Brazilian view were countries as the US<sup>98</sup> and Norway,<sup>99</sup> which defended the application of freedom of scientific research on the continental shelf to applied researches, or “resource-oriented research”. To that argument, the Brazilian delegation replied that a virtual monopoly of marine scientific research within a few states could not be perpetuated. A most suited way to interrupt such monopoly would, thus, be to develop a *full consent regime*. For Brazilian negotiators, it was clear that article 246, paragraph 6, would not create a dual system for scientific research on the continental shelf, to the contrary, article 246 “confirmed the coastal State’s sovereignty over the shelf, in the exercise of which the coastal State might waive some of its rights”.<sup>100</sup>

the continental shelf beyond 200nm. See para. 8, Report of the 128<sup>th</sup> Meeting of the 2<sup>nd</sup> Committee.

86 A/CONF.62/SR.135 135th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIV, para 61.

87 136th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIV, para 63.

88 In such an opinion, Brazil was sided by New Zealand, whose delegation considered that the dual regime of article 246 represented a “further derogation from the rights of broad margin states”. See A/CONF.62/SR.126 126th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIII, para 80.

89 A/CONF.62/SR.126 126th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIII, para 129.

90 The Argentinian delegation envisaged the dual regime for MSR on the continental shelf as a “further sacrifice of the legitimate interests of coastal States and a further restriction on their sovereign rights over the continental shelf”. See A/CONF.62/SR.126 126th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIII, para. 89.

91 For Ecuador, “Coastal States alone had the right to carry out, control, authorize, suspend or refuse permission for scientific research”. See *Idem*, para. 117.

92 To the Guyanese delegation, coastal state’s sovereign rights over the continental shelf would “suffer from ambiguity”, should a specific and parallel regime for scientific research on the continental shelf be established. See A/CONF.62/SR.128 128th Plenary meet-

ing, para. 181.

93 For Uruguay, “research activities carried out on the continental shelf beyond 200 miles, the formula ultimately agreed upon must not limit the sovereign rights of the coastal State as recognized in customary and treaty law”. See A/CONF.62/SR.128 128th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIII, para. 55.

94 A/CONF.62/SR.128 128th Plenary meeting, para. 73.

95 The Mozambican delegation “could not accept the idea of freedom of research on the continental shelf”. A/CONF.62/SR.139 139th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIV, para 31.

96 A/CONF.62/SR.128 128th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIII, Ninth Session, para 55.

97 The Pakistani delegation was even of the view that “the exercise by the coastal State of a right or discretion regarding withholding consent or ordering suspension or cessation of a project in its exclusive economic zone or on its continental shelf could not be made subject to any dispute settlement procedure or conciliation proceedings without its consent”. A/CONF.62/SR.127 127th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIII, para. 145

98 The American delegation favored the “liberalization of the regime of marine scientific research applied only to the continental shelf beyond the exclusive economic zone and not within the zone. See A/CONF.62/SR.113 113th Plenary meeting, para. 63.

99 A/CONF.62/SR.128 128th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIII, para. 214.

100 136th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIV, para 32.

Ultimately, a more liberal regime for scientific research activities over the outer continental shelf was adopted in UNCLOS Article 246 (6). Therefore, the wording chosen by the Brazilian delegation was not fully consistent with the Convention's, as sovereignty is too a strong expression to describe the rights possessed by the coastal state over the continental shelf. However, the main message of that declaration was to question and oppose attempts to bend coastal states' powers over continental shelf riches and resources.

Finally, a discussion in which Brazil intervened several times during the III UNCTLOS dealt with the tension between the continental shelf beyond 200nm and the internationalization of the deep seabed (the Area), as formulated in Resolution 2749.<sup>101</sup> In this regard, Brazil defended its interests as a broad-margin country.<sup>102</sup> On the one hand, consideration for the New International Economic Order (NIEO) premises were expressed in the Brazilian support for the internationalization of the deep seafloor, which would be placed under a regime of *res communis* and benefit and technology sharing between developed and developing states. On the other hand, the country advanced the possibility of an outer continental shelf, i.e. extending beyond 200nm.

The particularity of this issue is that other developing states starkly objected any continental shelf extension beyond 200nm, fearing the private appropriation of the deep seabed by technologically advanced states. Hence, a group of African, Arab and Land-locked states opposed the very existence of domestic jurisdiction over those areas (or resources). Any extension beyond 200nm would imply a derogation of the common heritage principle and a practical reduction of the extent of the Area.<sup>103</sup>

The list of countries opposing the extended continental shelf includes: Zaire,<sup>104</sup> Swaziland, to whom

UNCLOS article 76 "severely truncated the concept of the common heritage of mankind, which was already limited in scope by the 200-mile exclusive economic zone",<sup>105</sup> Syria,<sup>106</sup> Bulgaria (to whom the outer continental shelf implied an "appropriation of the ocean space"),<sup>107</sup> Libya,<sup>108</sup> Algeria,<sup>109</sup> Ghana,<sup>110</sup> Malta (who claimed for more safeguards against the "shrinkage of the common heritage of mankind"),<sup>111</sup> Tunisia,<sup>112</sup> Kuwait,<sup>113</sup> Yugoslavia,<sup>114</sup> among others.

To some countries, the formulae contained in UNCLOS article 76 tended to "accentuate inequalities" and to affirm a doctrine of appropriation based on geopolitical advantages".<sup>115</sup> Severe concern was displayed by Tonga, to whom article 82, providing for payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles, seemed

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the Law of the Sea, Volume XIV, para 92.

105 A/CONF.62/SR.138 138th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIV, para 131.

106 A/CONF.62/SR.139 139th Plenary meeting, para 172.

107 A/CONF.62/SR.103 103rd Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume IX, para 56.

108 According to the Libyan position, If the proposed international sea-bed authority was to have due competence and to be able to explore and exploit efficiently the resources of such areas, the continental shelf must not extend beyond the 200-mile limit. See A/CONF.62/SR.104 104th Plenary meeting, para 66.

109 The Algerian delegation fully supported the position of the Arab group, which would place a limit on the prolongation of the continental shelf. Otherwise, the concept of the common heritage of mankind would be infringed. Any formula which would have the effect of reducing the common heritage of mankind could not be supported. *Idem*, para. 74.

110 To Ghana, it was essential that the outer limit of the continental shelf should *not* exceed 200 nautical miles if activities on the sea-bed beyond the limits of national jurisdiction were to be regulated for the benefit of mankind as a whole, in accordance with the concept of the common heritage of mankind. See A/CONF.62/SR.105 105th Plenary meeting, para 26.

111 See A/CONF.62/SR.105 105th Plenary meeting, para 36.

112 A/CONF.62/SR.127 127th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIII, para 60.

113 To Kuwait, any extension of the continental shelf beyond 200 miles from the baselines from which the breadth of the territorial sea was measured would constitute an encroachment on the common heritage of mankind. See A/CONF.62/SR.128 128th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIII, para 94.

114 A/CONF.62/SR.134 134th Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIV, para. 80.

115 Stance held by the Bulgarian delegation. A/CONF.62/SR.103 103rd Plenary meeting, para 56.

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101 United Nations General Assembly. **Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction.** Resolution 2749, A/RES/25/2749, 12 December 1970.

102 In that, Brazil was joined by Canada (who considered the revenue-sharing mechanism contained in article 82 to be a substantial concession made in good faith by broad-margin states). See A/CONF.62/SR.102 102nd Plenary meeting Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume IX, para. 9.

103 It was the case of Yugoslavia, para 80 and Romania, para. 88, during the 134<sup>th</sup> plenary meeting.

104 A/CONF.62/SR.138 138th Plenary meeting Extract from the Official Records of the Third United Nations Conference on

to indicate a certain “guilty conscience”. If the parties would endorse the outer continental shelf, not even the revenue-sharing arrangements would compensate for the large losses of the international community.<sup>116</sup>

It does not mean that Brazil and other developing states with similar position objected the birth of the innovative concept of a “common heritage of mankind”. To the contrary, the Brazilian stance combined support for larger outer limits of the continental shelf with the internationalization of the deep seabed. Back at the day, commentators opposing the restrictive approach to the exploitation of the international seabed criticized developing states’ and Brazilian position of being a treason to fellow (underdeveloped) countries, given that most rentable resources would fall under national jurisdiction and not be accountable for the revenue-sharing mechanism enshrined at UNCLOS Article 82.<sup>117</sup> Other scholars accentuated the so-called NIEO “paradox”, which was to lay emphasis on common responsibilities for overcoming poverty, while advancing particular interests and unilateral sovereign claims.<sup>118</sup>

The paradox argument was a simplistic way of analyzing a most complex context, claiming that the “fillet mignon” of marine resources should remain beyond national jurisdictions and be subject to freedom of access and exploitation. In brief, a regime in which technologically advanced states could feast, so that developing states could earn crumbs originating from financial contributions of 7% over the commercial value of extracted resources. If such would be the legal regime of the Area nowadays, the international society would potentially be witnessing once again the ludicrous trade relations between the powerful and the subdued, in which developing countries would be trading gold for trinkets. In this sense, the combination between “sovereignty” (in conceiving the EEZ and outer continental shelf) and “humanity” (in applying the common heritage principle to the Area) represented a most compelling weapon in the struggle for a renewed international law

of the sea.<sup>119</sup>

Privileges to developed nations would have been exacerbated even further in the deep seabed regime, were it not for Arvid Pardo’s proposal of a common heritage principle.<sup>120</sup> In fact, had the freedoms of the high seas ruled over the deep seabed, “the developed States of the West, which alone could muster the necessary investment and technology, would be the main beneficiaries of sea-bed mining”.<sup>121</sup> To remove those resources from the individual reach of developed maritime states, while simultaneously asserting exclusive economic jurisdiction over marine resources in a larger adjacent sea-belt to shore, were alternatives found by developing countries to tackle the inherent unfairness in previous rules of international law.

## 5. CONCLUSION: HAS BRAZIL BEEN A BOGEYMAN OR A CATALYST FOR CHANGE IN THE LAW OF THE SEA?

Criticisms against territorialism and creeping jurisdiction of coastal states in the law of the sea allow a few conclusions on the dominant theses in specialized literature. Firstly, most analyses give priority to the principle of freedom of navigation, the unofficial overriding principle, to the detriment of territorial sovereignty and socioeconomic development. Secondly, the practice of putting forward jurisdictional assertions is depicted as excessive and undesirable in every scenario and, therefore, damaging to the maintenance of peace and order in the world oceans.<sup>122</sup> Early unilateral claims prior to 1982 had violated customary law and newer claims have infringed UNCLOS provisions.

Those are views espoused by the law of the sea doctrine bred in policy and research centers of the de-

116 Position defended by the Romanian delegation, A/CONF.62/SR.125 125th Plenary meeting, para. 26.

117 DANZIG, Aaron L. A funny thing happened to the common heritage on the way to the sea. *San Diego Law Review*, 12, n. 3, 1975, pp. 655-664, p. 656. See also CAUBET, Christian. *Fundamentos político-econômicos da apropriação dos fundos marinhos*. Florianópolis: UFSC, 1977, p. 95.

118 VITZTHUM, Wolfgang Graf. A new international economic order and a new global maritime regime. *Law and State*. Tübingen, v. 19, 1979, pp. 7-24, p. 10.

119 PUREZA, José Manuel. *O patrimônio comum da humanidade: rumo a um direito internacional da solidariedade?* Porto: Afrontamento, 1998, p. 175.

120 United Nations General Assembly. *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction*. Resolution 2749, A/RES/25/2749, 12 December 1970.

121 CHURCHILL, Robin and LOWE, Vaughan. *The Law of the Sea*. Manchester: Manchester University Press, 1983, p. 157.

122 See, for instance, BURKE, William. Law, Science, and the Ocean. *Natural Resources Law*, vol. 3, 1970; and GOLDIE, L. International Principles of Responsibility for Pollution, *Columbia Journal of Transnational Law*, vol. 9, 1970.



veloped North, opinions grounded on a good deal of legalism and dogmatism. In this context, a Southern narrative could make itself be heard in a most crystalline way; a narrative objecting traditional privileges and centuries of hegemony featured by maritime powers; a narrative that perceives the field as a compound of *juridico-political* constructs stemming from political struggles. It was so with the disputes for a territorial sea of twelve nautical miles, since the 1930s, for a 200-mile exclusive economic zone, for an outer continental shelf, for an internationalized deep seabed subject to the common heritage principle, and, nowadays, for enhanced marine environmental protection.

Territorialist positions in the pre-UNCLOS ocean order were crucial, as they defied the model of colonial spoliation which inspired the law of the sea until that time.<sup>123</sup> The opposite of the so-called “jurisdictional creep” would, thus, be a *spoliative jurisdiction*, one that connotes the colonialist origins of international law as legal system that favored technologically advanced coastal states through overwhelming prestige to the freedom of seas in detriment to the economic needs of developing coastal states. Such prestige was none other than the direct result of the primary role played by maritime states in shaping the public order of the oceans over the course of history.<sup>124</sup>

In this context, Brazil played an important part in catalyzing changes, partially due to the country’s size, economic status, and political clout. By affirming sovereignty over the 200-mile zone, Brazil and other developing countries obtained decisive bargaining power for international negotiations during the III Conference. Ultimately, Brazilian practice prior to the adoption of the UNCLOS were instrumental to the emergence of a

“new law of the sea”, one sensitive to social, economic and human needs, which sees in maritime spaces not just the ideal landscape for navigation, but also the treasures capable of satisfying various needs of peoples. As knowledgeably alluded by Vicente Marotta Rangel,<sup>125</sup> a law of the sea focused on enhancing life conditions of each people and of humanity as a whole.

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125 RANGEL, Vicente Marotta. **Natureza jurídica e delimitação do mar territorial**. São Paulo: Revista dos Tribunais, 1966.

123 As claimed by George Galindo in a previous publication in this Journal, the history of international law is inescapably linked to the *practice* of international law. In the case of the law of the sea, generalized practice held that an ancient dual-division of the oceans was unfair in the light of technological developments, thereby justifying the (usually seen as) heinous jurisdictional expansion of coastal states seawards. For more on the relevance of a critical history of international law, one in which lawyers understand past practices to assess the current challenges of international law, see GALINDO, George Rodrigo Bandeira. Para que serve a História do Direito Internacional? **Brazilian Journal of International Law** (Revista de Direito Internacional), v. 12, issue 1, 2015, p. 339.

124 “Over the course of history, powerful maritime states have played the primary role in shaping the public order of the oceans”, in BECKER, Michael A. The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea. **Yale Law Review**, 2005, p. 131.



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